

1 BEFORE THE PERSONNEL APPEALS BOARD

2 STATE OF WASHINGTON

3 DAN KARTON,

4 Appellant,

5 v.

6 DEPARTMENT OF CORRECTIONS,

7 Respondent.

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Case No. RED-97-0018

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND ORDER OF THE BOARD

8  
9 INTRODUCTION

10 1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER  
11 T. HUBBARD, Chair; GERALD L. MORGEN, Vice Chair; and NATHAN S. FORD Jr., Member.  
12 The hearing was held in the Superintendent's Conference Room at the Washington State  
13 Reformatory in Monroe, Washington, on September 24, 1999.

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15 1.2 **Appearances.** Appellant appeared *pro se*. Respondent Department of Corrections was  
16 represented by Robert W. Kosin, Assistant Attorney General.

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18 1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a reduction in salary  
19 for Appellant allegedly making disparaging comments about another employee.

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21 1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084  
22 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Skaalheim v.  
23 Dep't of Social & Health Services, PAB No. D93-053 (1994); Shepard v. Dep't of Corrections,  
24 PAB No. RED-98-0026 (1998).

25 Personnel Appeals Board  
2828 Capitol Boulevard  
26 Olympia, Washington 98504

## II. FINDINGS OF FACT

2.1 Appellant Dan Karton is a Correctional Sergeant and a permanent employee for Respondent Department of Corrections. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on March 20, 1997.

2.2 By letter dated February 27, 1997, Respondent reduced Appellant's salary by ten percent for three months for neglect of duty and willful violation of published employing agency or Department of Personnel rules or regulations. Specifically, Respondent alleged that during a conversation with Sergeant Ray Kornegay, Appellant made disparaging comments about Correctional Officer (CO) Charles Rissman. Respondent alleged that in response to questions about the person Appellant was marrying, Appellant said, "No, unlike Rissman, I don't accept institutional rejects that have been used by Tom Wright and 15 other guys" and he stated to Officer Rissman, "I hate to have to slap the shit out of short people." This conversation took place in the presence of CO Rissman, CO Joel White, and three inmates. In addition, CO John Firth was present for some of the conversation.

2.3 Appellant is the Property Room Sergeant. On November 1, 1996, he and CO Firth went to Cell Block 3 to perform duties related to the property belonging to inmates who were scheduled to leave the institution. While CO Firth proceeded down the tier to talk to the inmates, Appellant remained in the area of the officers' desk near the booth and engaged in a conversation with Sgt. Kornegay.

1 2.4 CO Rissman and CO White were also present. CO White alluded to Appellant's upcoming  
2 marriage and those present questioned Appellant about who he was marrying and began to tease  
3 Appellant about getting married.

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5 2.5 During the conversation, Appellant made a derogatory comment to Sgt. Kornegay, in direct  
6 reference to CO Rissman and his girlfriend who was also an employee of the institution. Appellant  
7 said, "No, unlike Rissman, I don't accept institutional rejects that have been used by Tom Wright  
8 and 15 other guys." Prior to the end of the conversation, Appellant made a comment to CO  
9 Rissman about short people. Appellant said, "I hate to slap the shit out of short people."

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11 2.6 CO Rissman found Appellant's comments offensive and told his supervisor, Sgt. Kornegay,  
12 that he wanted such comments to stop. Sgt. Kornegay reported the incident to Lieutenant Steven  
13 Westland. Lt. Westland initiated an Employee Conduct Report (ECR).

14  
15 2.7 Appellant provided a written response to the ECR. Appellant stated that the comments he  
16 made were exaggerated and taken out of context and he challenged the fairness of the ECR process.

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18 2.8 The ECR supervisor's report was completed by Correctional Captain Jimmie Evans.  
19 Captain Evans contacted CO Rissman, CO White, and Sgt. Kornegay. Appellant informed Captain  
20 Evans that he declined to participate in the ECR process until he had an opportunity to review the  
21 evidence.

22  
23 2.9 Captain Evans proceeded with the ECR process and determined that Sgt. Kornegay asked  
24 Appellant if the person Appellant was planning to marry was from the area. Appellant responded,

1 “No, unlike Rissman, I don’t accept institutional rejects that have been used by Tom Wright and 15  
2 other guys.” Captain Evans further determined that as Appellant was leaving the area, he said, “I  
3 hate to slap the shit out of short people.” Captain Evans also determined that these comments were  
4 made in the presence of three inmates.

5  
6 2.10 Captain Evans forwarded the ECR to Associate Superintendent Michael Williams. On  
7 January 10, 1997, Mr. Williams provided Appellant with copies of the witness statements and  
8 scheduled a meeting with Appellant for January 16, 1997. Appellant did not attend the meeting. As  
9 a result, Mr. Williams rescheduled the meeting for January 21, 1997. Appellant did not contact Mr.  
10 Williams or attend the January 21, 1997 meeting. Based on the information provided during the  
11 ECR process, Mr. Williams determined that Appellant’s comments were degrading, insulting and  
12 abusive and did not meet the standard of professional conduct expected of a Correctional Sergeant.  
13 Mr. Williams forwarded his report to Superintendent Kenneth DuCharme.

14  
15 2.11 At the time of this disciplinary action, Superintendent DuCharme was the appointing  
16 authority and was responsible for employee discipline. Superintendent DuCharme reviewed all the  
17 information from the ECR process and reviewed Appellant’s personnel file. In Appellant’s  
18 personnel file, Superintendent DuCharme found that Appellant had been given a letter of concern  
19 because of his failure to report staff misconduct and had been given a letter regarding an incident in  
20 which Appellant made an offensive comment about a subordinate employee. Superintendent  
21 DuCharme found that in this incident, Appellant continued to exhibited inappropriate,  
22 unprofessional behavior which violated the department’s Code of Ethics. Because this incident was  
23 similar in nature to the previous letter and because CO Rissman was a subordinate to Appellant,

1 Superintendent DuCharme felt the formal disciplinary action in the form of a ten percent, three  
2 month reduction in salary was necessary.

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4 2.12 Although CO Firth was not interviewed during the ECR process, he testified before the  
5 Board and confirmed that he heard Appellant make the comment about short people.

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7 2.13 The department's Code of Ethics requires that employees "subscribe to a code of unfailing  
8 honesty, respect for dignity and individuality of human beings, and a commitment to professional  
9 and compassionate service." The department's expectations require employees to "[t]reat fellow  
10 staff with dignity and respect." (Ex. R-1, Att 2).

### 11 12 **III. ARGUMENTS OF THE PARTIES**

13 3.1 Respondent asserts that Appellant's reduction in salary for making inappropriate comments  
14 was supported by his prior misconduct of a similar nature. Respondent asserts that Appellant had  
15 ample opportunity to provide information during the ECR process, but instead he chose to challenge  
16 the process and declined to provide information other than to assert that what he said was taken out  
17 of context. Respondent contends that the witnesses to the incident were truthful and had no reason  
18 to lie. Respondent further contends that even if the conversation began jokingly, Appellant crossed  
19 the line by making comments of a personal, inflammatory nature about a subordinate and the  
20 subordinate's girlfriend. Respondent argues the such intentional, inflammatory and unprofessional  
21 behavior, especially in the presence of inmates, cannot be tolerated and that as a supervisor,  
22 Appellant has a higher level of accountability for his actions and behavior. Respondent claims that  
23 Appellant failed to meet the standard of conduct expected of a supervisor and that the disciplinary  
24 action should be affirmed.

1 3.2 Appellant does not deny making comments in response the officers teasing him about his  
2 upcoming marriage. However he denies calling CO Rissman's girlfriend an "institutional reject"  
3 and denies saying "slap the shit." Appellant argues that the ECR process was flawed and that  
4 Respondent failed to conduct a complete and thorough investigation, failed to interview all the  
5 witnesses and consider all the evidence, and failed to provide him with the information he needed to  
6 respond to the charges. Appellant contends that Respondent engages in an endless game of losing  
7 and manipulating evidence at the department's convenience. Appellant asserts that in the context of  
8 the entire conversation, his comments were no different than what everybody does and his  
9 comments did not call for formal disciplinary action to be taken against him.

#### 10 11 **IV. CONCLUSIONS OF LAW**

12 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter  
13 herein.

14  
15 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting  
16 the charges upon which the action was initiated by proving by a preponderance of the credible  
17 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the  
18 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of  
19 Corrections, PAB No. D82-084 (1983).

20  
21 4.3 Respondent appropriately investigated this incident using the ECR process. Appellant had  
22 an opportunity to participate in the process and to provide additional information. Appellant  
23 provided no evidence to support his allegations that the investigation was incomplete or that the  
24 ECR process was not properly followed.

1 4.4 Neglect of duty is established when it is shown that an employee has a duty to his or her  
2 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't  
3 of Social & Health Services, PAB No. D86-119 (1987).

4  
5 4.5 Willful violation of published employing agency or institution or Personnel Resources  
6 Board rules or regulations is established by facts showing the existence and publication of the rules  
7 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the  
8 rules or regulations. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social &  
9 Health Services, PAB No. D93-053 (1994).

10  
11 4.6 By a preponderance of the credible evidence, Respondent has met its burden of proof that  
12 Appellant made the comments on November 1, 1996, that his comments constituted misconduct,  
13 and that his misconduct constituted neglect of duty and willful violation of published department  
14 rules or regulations. Appellant was aware of his duty to abide by department expectations and  
15 standards of conduct and, as a Correctional Sergeant, he should have been aware of his higher level  
16 of accountability to abide by these expectations and standards of conduct. Appellant neglected his  
17 duty when he admittedly made derogatory comments about his subordinate. Regardless of whether  
18 Appellant's comments were in response to comments made to him by others, as a Correctional  
19 Sergeant, Appellant is in a position of authority and he should not condone or participate in such  
20 behavior.

21  
22 4.6 In Shepard v. Dep't of Corrections, PAB No. RED-98-0026 (1998), the Board upheld a ten  
23 percent, six month reduction in salary for a Correctional Officer 2 who, in part, made derogatory,  
24 inappropriate and disparaging comments to and about another employee. In this case, where

1 Appellant holds a supervisory position and where he has been given prior corrective action for  
2 similar behavior, a ten percent, three month reduction in salary is justified.

3  
4 4.7 Respondent has met its burden of proof that Appellant committed the misconduct outlined in  
5 the disciplinary letter. In addition, Respondent has proven that the disciplinary sanction is  
6 appropriate. Therefore, the appeal should be denied.

7  
8 **V. ORDER**

9 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Dan Karton is denied.

10  
11 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1999.

12  
13 WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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17 \_\_\_\_\_  
Gerald L. Morgen, Vice Chair

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19 \_\_\_\_\_  
Nathan S. Ford Jr., Member

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